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**IN THE**

**Supreme Court of the United States**

**October Term, 1957**

**Nos. 382 and 385.**

**THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corpora-**  
**tion,**

*Petitioner,*

*vs.*

**COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L.**  
**BYRAM, County of Los Angeles Tax Collector, and JOHN R. QUINN,**  
**County of Los Angeles Assessor.**

**VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.**

*Petitioner,*

*vs.*

**COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS AN-**  
**GELES, CALIFORNIA; H. L. BYRAM, County Tax Collector.**

**PETITIONERS' CONSOLIDATED REPLY**  
**BRIEF.**

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**PETITIONERS' CONSOLIDATED REPLY  
BRIEF.**

**I.**

**The Oath Violates Due Process and Equal Protection  
[Reply to Respondents' Points I, II and V(2)].**

**A. The Fact That Tax Exemption Is Involved Does Not  
Immunize the Statute From Constitutional Controls.**

This Court has never permitted the fact that "a gratuity or favor" (Resp. Br. 9) was being unconstitutionally taken away to deter it from declaring just that and to not permit it.

Justice Brandeis' dissent in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 427 was approved by this court in *Hannegan v. Esquire*, 327 U. S. 146, 145:

"(G)rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever."

In other words, albeit a privilege is involved, a state may not, consistent with the Constitution, take it away on grounds or by means that are arbitrary or unreasonable. This principle was admirably, and successfully, argued to this court (at pp. 7, 8, 74 of the reprint appearing in 25 ABA J1 7) in the *amicus curiae* brief filed by the Bill of Rights Committee of the American Bar Association in *Hague v. CIO*, 307 U. S. 496.<sup>1</sup>

And the principle has been more than once applied by this Court to strike down, as unconstitutional, State action which arbitrarily and unreasonably, as here, sought to deprive of a privilege.<sup>2</sup>

In *Wieman v. Updegraff*, 344 U. S. 183, 192, this Court said:

" . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Compare concurring opinion in *Garner v. Board of Public Works*, 341 U. S. 716, 725:

"But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment. . . . To describe public employment as a privilege does not meet the problem."

And to the same effect is *Slochower v. Board of Higher Education*, 350 U. S. 551, 555:

" . . . To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."

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<sup>1</sup>Signatories to the brief were Douglas Grant, Zechariah Chafee, Jr., Grenville Clark, Osmer C. Fitts, George I. Haight, Monte M. Lemann, John Francis Neylan and Joseph A. Padway.

<sup>2</sup>While technically church tax exemption may be described as being a privilege, it is certainly a strongly engrained and venerable one.

In the *Wieman* and *Slochower* cases this Court struck down, as arbitrary, state statutes calling for compulsory disclosure on pain of loss of job. And in *Garner*, the ordinance was sustained only by means of an assumption, not possible in the case at bar, of a non-arbitrary interpretation by the State courts.

Another recent example of where the fact that a state privilege was involved did not blind this Court to arbitrary conduct by the State is *Schwartz v. Board of Bar Examiners*, 353 U. S. 232. In that case the concurring opinion pointed out (353 U. S. at 248 and 249) that:

“ . . . Admission to practice in a State and before its courts necessarily belongs to that State . . .

“ . . .

“But . . . (r)efusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause

”<sup>2a</sup>

We submit that just as in *Schwartz*, “such is the case here” (*ibid.*).<sup>2b</sup>

<sup>2a</sup>On the Equal Protection phase of the instant case, touched on by respondents in their brief, pp. 9-12, the case of *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, can be added to the cases cited by petitioners in note 40, pg. 39 of their opening brief as peculiarly in point because that case does indeed involve a state tax exemption. The refusal of the state to grant the exemption in that case, this court held, violated the equal protection clause of the 14th Amendment.

<sup>2b</sup>The *Schwartz*, as well as the *Konigsberg v. State Bar*, 353 U. S. 252, decisions of this Court demonstrate that even so “statey” a privilege as admission to practice law before state courts will not be permitted of abridgment under the guise of a state “privilege”. In this connection it should be pointed out that *In re Summers*, 325 U. S. 561, relied upon by respondents in their separate answer to the brief amicus curiae of the American Civil Liberties Union, was posited upon the decisions of this Court in *United States v. Schwimmer*, 279 U. S. 644 and *United States v. Macintosh*, 283 U. S. 605. Respondents fail to note that both the *Schwimmer* and *Macintosh* cases were expressly overruled in *Girouard v. United States*, 328 U. S. 61, 69 and that the dissents of Justice Holmes and Chief Justice Hughes represent the law today.

### B. The Oath Is Arbitrary and Unreasonable.

Respondents concede (Br. 4) that freedom of speech and of religion are infringed herein, but they argue that the interest of the state justifies the infringement. We submit the contrary.

What is the real purpose of the legislation here being examined that justifies the wholesale<sup>3</sup> requirement for the loyalty oath involved? The majority below tells us (R. F. 51, 52) that it is for the state to maintain "the loyalty of its people" and to thus safeguard "against its violent overthrow by internal or external forces." In other words it is an "endeavor (on the part of the State) to protect itself against subversive infiltration" (R. F. 52) or, put another way, it is a means hit upon by the State to protect itself against Communists.<sup>4</sup>

In the *Wieman* case the same laudable object was at hand, just as it was in *Slochower*.<sup>5</sup> But this Court found the interest not sufficient to overcome the Constitutional violations involved.

The question then becomes one of determining whether the evil at which the state has directed this incursion into freedom is sufficiently real and of sufficient magnitude to be allowed, or whether, in fact, it is but a "remote, shadowy threat to the security of California"

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<sup>3</sup>The 1957 Annual Report of the Los Angeles County Tax Assessor shows (pp. 19, 22, 69) that 539,659 claims for exemption were filed. Projected statewide (Los Angeles County has about 40% of the population of the state) this means that about 1,350,000 filed claims (were required to take the oath) in 1957. These figures do not include the number of corporations which were required to take the oath under Section 23705 of the Revenue and Taxation Code. Nor do they include the number of persons or organizations who did not file claims for exemption, though entitled thereto.

<sup>4</sup>If there be any doubt as to this latter, one need only look to the Arguments presented to the voters at the time Article XX was voted upon (these arguments have previously been lodged with the Clerk) where it was said (pg. 7): "There is no valid reason why such exemptions should be allowed communists and the like."

<sup>5</sup>The problem of balancing the state's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one." (350 U. S. at 555.)

allegedly present in the doctrine that may be preached by churches. (*Sweezy v. New Hampshire*, 354 U. S. 234, 265, concurring opinion.)

It is submitted that the evil is not real, not present and that the whole program deals indeed with shadows, fantasy, fancy and chimera. It has never been suggested that in California there was any, or any danger of any, infiltration by Communists in the churches or other charitable organizations. The legislature made no such findings.<sup>6</sup> The arguments to the voters did not suggest that there was any such danger from California churches or any other exempt class. No judge in California who passed on the cases has suggested there was any such infiltration. The statements by the three dissenting justices below that there was no danger or infiltration was not challenged by the majority,<sup>7</sup> nor have respondents, nor do they now.<sup>8</sup>

Nor is there here the direct relationship that was present in other cases where this Court has upheld loyalty oaths.<sup>9</sup> The relationship between the state and church

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<sup>6</sup>And the California legislature has made findings of the danger of communist infiltration in other field, *e.g.* teaching (Ed. C. 12600) and public employment (Gov. C. 1027.5).

<sup>7</sup>Indeed the majority conceded the point (R. F. 56).

<sup>8</sup>Respondents' lame claim (Br. 24) that "advocacy was not to put in issue and under the pleadings there could be no showing that churches have engaged in advocacy," is a *non sequitur*. The constitutionality of Article XX as an infringement on free speech and freedom of religion was put in issue by the pleadings. In *ACA v. Douds*, 339 U. S. 382, the question, of whether the complainants were members of or were believers in, was also not put in issue, but the court made very clear that it was upholding the legislation because Congress was warranted in finding, and did find, that there was a danger from those at whom the statute was directed. Respondents can make no such claim here—nor do they.

<sup>9</sup>*E.g.* danger from interstate strikes (*ACA v. Douds*, 339 U. S. 382); fitness for employment where the employer has a right to know whether its employee is plotting its destruction (*Garner v. Board of Public Works*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485).

advocacy is, even in theory, remote; in actuality it is non-existent.

It is noted that respondents do not support the court below (R. F. 52) in looking at the object of the legislation as intending to secure loyalty and to deal with subversives.<sup>9a</sup> Respondents uphold the legislation on the ground (Br. 4, 13, 37) that the exemption is granted in the first place for the public service<sup>9b</sup> the church will perform and that when a church advocates as proscribed by Article XX and Section 32, it no longer performs those functions and therefore the exemption may be taken away (Br. 13). But aside from the fact that all this is drawn out of thin air and whole cloth without any showing or contention that any church in California has or is likely not to function as it has in the past, respondents' argument completely misses the mark.

The exemption is denied not only to churches who *advocate*; it is also and, as it turns out, denied only to those who will not say because of sincere conscientious belief that the State has no right to require such confessions from the church.<sup>10</sup> An essential basis for the church in a democracy is that it be a free institution posited on conscience. It is precisely when it refuses to tell the state what it does or does not advocate that it is and is acting like a church. Therefore it is incorrect for respondents, and arbitrary for the State, to say that a church fails to render a public service when it stands up to the State. Were it otherwise, the Church would then simply be an organ of the political State, a concept which is abhorrent in this country.

But even if there were an evil or danger from churches in California, the means, the Oath, used to meet that

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<sup>9a</sup>Respondents state (Br. 65): "A church organization may be wholly disloyal and still qualify for exemption."

<sup>9b</sup>In their answer to the American Civil Liberties Union, respondents use the term "social benefit." (pg. 4).

<sup>10</sup>This is precisely the case here. Thus note that at Br. 39, respondents concede that "the proscribed advocacies as to overthrow of government and war support of the enemy certainly cannot be their (petitioner's) church doctrine or belief or religion."

evil is too sweeping and encompassing to meet constitutional demands.

It is to be remembered that it is as to churches and conscience with which we are dealing. To impose the pervasive dampener of the loyalty oath upon all churches and other charitable organizations is unwarranted.

In the concurring opinion in *Garner v. Board of Public Works*, 341 U. S. 716, 728, it was said of the oath there:

"The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."

Equally, or more, necessary is it that there not be the atmosphere of repression imposed by the State on the Church.

In *Kedroff v. Saint Nichols Cathedral*, 344 U. S. 94, 118, it was pointed out that in *American Communications Association v. Douds*, 339 U. S. 382, this Court permitted the intrusion on First Amendment rights, because of the "present excesses of direct, active conduct," but that that case did not stand for the proposition that the State could intrude in Church affairs, even as to the possession and use of a building "because of an apprehension, even though reasonable, that it may be employed for improper purposes." No more can the same be done here where there is "not even an apprehension."<sup>10a</sup>

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<sup>10a</sup> Respondents' statement (Answer to ACLU, pg. 8): "The power of a state to allocate its limited resources is fundamental to its existence. This heavily outweighs any infringement of free speech employed in advocacy of violent overthrow of the government or of war time support of a foreign government", speaks in a vacuum. Not only that; it speaks in the face of contrary fact. At the minimum, it would seem, the State should be required to assert, and show, that the danger at which the infringement is directed does exist. Otherwise, the mere assertion of power would justify the infringement. Such, we submit, is not the law.

In the concurring opinion in the *Kedroff* case, note was taken (344 U. S. at 123) of the fact that in the agreement between the Papal See and Mussolini. "The supremacy of the state was recognized by compelling bishops and archbishops to swear loyalty to the government." But in this country, there is no such theory. The opinion continued:

" . . . The fear, perhaps not wholly groundless, that the loyalty of its citizens might be diluted by their adherence to a church entangled in antagonistic political interests, reappears in history as the ground for interference by civil government with religious attachments. Such fear readily leads to persecution of religious beliefs deemed dangerous to ruling political authority. . . . The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority. . . ."

The attempt by the state here is just that.

In the concurring opinion in *Wieman v. Updegraff*, 344 U. S. 183, 195, it was said:

" . . . (I)n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amend-

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(*Yates v. United States*, 354 U. S. 298; *Slochower v. Board of Higher Education*, 350 U. S. 551; *Sweezy v. New Hampshire*, 354 U. S. 234.)

Respondents cavalier assertion (Answer to ACLU Br., pg. 8) that where there is a choice given the citizen to assert his constitutional right of free speech or to forego it, the First Amendment "is inherently less" infringed upon, is startling constitutional doctrine. No authority is cited for the proposition. Moreover, the statement is contrary to the facts of this case. It cannot be said that one has free choice when he must pay for the exercise of one's constitutional right. *Carter v. Carter Coal Co.*, 298 U. S. 238, 289.

ments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

The opinion acknowledged that "solid threats to our kind of government . . . may be met by preventive measures before such threats reach fruition," (*ibid.*) but in considering the constitutionality of legislation such as this "it is necessary to keep steadfastly in mind what it is that is to be secured" (*ibid.* at 196). Teachers were described "as the priests of our democracy" (*ibid.*). In the case at bar, actual priests are here.

What is involved in this case is no less than an assault on the intellect. The plea made in the concurring opinion in *Sweezy v. New Hampshire*, 354 U. S. 234, 255, on behalf of teachers applies equally here on behalf of the Church. It was there said (354 U. S. at 261) that:

"When weighed against the grave harm from governmental intrusion into the intellectual life of a university . . . justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate."

Grossly inadequate, also, does the justification appear for compelling a church to discuss its advocacy.

Just as a free society depends on free universities, so also does it depend on free churches. "This means the exclusion of governmental intervention in the intellectual life of a (church). It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of (clergyman), qualities at once so fragile and so indispensable for fruitful (ecclesiastical) labor" (paraphrased from concurring opinion in *Sweezy v. New Hampshire*, 354 U. S. at 262).

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Thus viewing the case, and properly so, as we submit, the contention of respondents (Br. 19-21) that the oath requirement here is but an innocuous "evidentiary provision" is to fail to see the oppressive hand of the state in its true light. That the state is entitled to *facts* is not gain-said. But it is entitled only to facts, not to avowals as to opinions or advocacy. Proof of ownership, value, use, location, necessity to file a claim, are matters entirely different from what the state is demanding here. The pervasive pall cast by the oath here required and the damage done to the free spirit of the church thereby are prices too big to pay for any factual information the state may get. The subordinating interest of the state here is not so compelling as to make the church forego so basic a liberty as its autonomy.

The oath is arbitrary and unreasonable.

## II.

### **The Oath Violates the Principle of the Separation of Church and State [Reply to Respondents' Point V(1)].**

Respondents miss the point and they miss the lesson of the First Amendment when they posit this part of their case on the argument "that the proscribed advocacies are not religion." (Br. 38.) Whether the advocacies are or not is beside the point.<sup>11</sup> Even if change of government, by overthrow or otherwise are "secular and not matters of religion," (Resp. Br. 53) this does not mean that the

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<sup>11</sup>Although one certainly treads on treacherous ground when he seeks to get a court to define religion. (*United States v. Ballard*, 332 U. S. 78, 87; *Fowler v. Rhode Island*, 345 U. S. 67, 70.) The Mormon cases relied upon by respondents (Br. 39, 40) do not stand for the proposition that a state may require a Church to take an oath as to advocacy.

state has power to compel the Church to acknowledge its faith therein. (*West Virginia Board of Education v. Barnett*, 319 U. S. 624.) To hold otherwise is to ignore, as indeed respondents have done in their brief, the lesson of history (see Pet. Op. Br. pp. 25-27; Appendix B) which teaches that it is just such oaths as this here, even contents and tax disability wise, which led to the very adoption of the First Amendment freedom of religion guarantee.<sup>12</sup>

Respondents state (Br. 41) "it is the merest chance that these particular exemption claimants and/or advocates happen to be church organizations." But chance or not, petitioners *are* churches and the state is seeking, contrary to its power, to force the church to confess as to doctrine.

The position taken by petitioners here that state coercion on a church to confess orthodoxy breaches the wall of separation is not that of petitioners' alone. This same interpretation of religion is made by other responsible churches and groups of churches all over the country. In an appendix hereto we set out some of the statements.

Respondents view this oath effort on the part of the state as a small matter; the churches need "merely" (Br. 53) declare that they do not advocate the violent overthrow of our country or war-time support of her enemy. But if the State can require this, it can require more. "In these matters of the spirit inroads on legi-

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<sup>12</sup>A forthcoming book, *To Try Men's Souls: Loyalty Tests in American History*, by Dr. Harold M. Hyman is scheduled for publication by the University of California Press in the spring of next year. It will treat with the history of such oaths more extensively. We are making effort to promptly furnish the Court a copy of the manuscript.

timacy must be resisted at their incipency. This kind of evil grows by what it is allowed to feed on." (*Swearsy v. New Hampshire*, 354 U. S. 234, 263-4, concurring opinion.) It is time to stop the feeding.

### III.

#### **The Oath Required by Section 32 Violates Due Process Because It Is Too Broad and Vague (Reply to Respondents' Point III, pp. 26-33.)<sup>13</sup>**

It is difficult to understand how respondents can state (Br. 31, 32) that "it does not appear from the record or the opinion below that overbreadth was argued so that the California court might define the limits of the statute." In its opinion the court below said (R. F. 40):<sup>14</sup>

"Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions."

Had not the court been requested to interpret, there would be little reason for it to have gone out of its way to make clear that it would not narrowly limit the meaning but would leave it as broad as the language permits.

Moreover in both complaints (R. F. 20, 29; R. V. 6) both petitioners urged from the very outset that the Oath violated the due process clause of the 14th Amendment because it is vague, indefinite and uncertain.<sup>15</sup>

<sup>13</sup>In their petitions and Opening Brief (see pp. 9-12 of the latter) petitioners argued that both Article XX and Section 32 contained the vice of vagueness. Respondents have replied only as to Section 32.

<sup>14</sup>Referring at this point to Article XX.

<sup>15</sup>R. F. 20: "The said Oath violates and denies the constitutional requirements of due process of law because of vagueness, uncertainty and indefiniteness . . . in violation of the due process of law provisions of the Fourteenth Amendment of the United States Constitution."

R. V. 5, 6: ". . . Section 32 of the Revenue and Taxation Code violate(s) . . . the due process clause of the 14th Amendment because of being vague, indefinite and uncertain."

Furthermore, the briefs of both petitioners specifically and succinctly argued the point to the court below and afforded ample opportunity for limitation to have been made were the court so minded.<sup>16</sup>

In the light of the specific refusal of the court below to narrowly interpret the statute, respondents' suggestion (Br. 32) that the formula adopted by this Court in *Garner v. Board of Education*, 341 U. S. 716, can be used to save the statute from its inherent vagueness is inappropriate.

Respondents refuse to read the language when they say (Resp. Br. 26) that the examples posed by petitioners (Pet. Op. Br. 9-10) are not examples of advocating "support of a foreign government against the United States." They certainly do not pose situations of support of the United States.

Moreover, respondents have failed to come to grips with the unavoidable vagueness of the term "support of

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<sup>16</sup>In No. 382, Petitioner's Opening Brief in the court below devoted its Point IV (pp. 68-69) to the point that "The terms of the oath at bar are so inexact and speculative as to be void and violative of due process; particularly is this so where the oath is applied in the area of religious belief and conscience as at bar." And in its Reply Brief, this same petitioner argued to the court below (pg. 22): "It is very strong in the law that statutes should be construed to *avoid* grave conflicts with Constitutional rights and requirements, and nowhere is greater deference to individual right paid, or greater effort expended to so contrive statutes as to avoid restrictions of individual liberty, than in the case of freedom of religion and of conscience." (Emphasis in original.)

In No. 385, Point II of Petitioner's brief below (pp. 25-35) was devoted to the argument that "... section 32 ... violate(s) due process of law and the First Amendment to the Federal Constitution in that (its) terms are so vague and indefinite as to serve as prior restraints upon religious belief and speech." From pages 32-35 of its brief, said petitioner argues that "The phrase: 'or who advocates the support of a foreign government against the United States' is so vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at its meaning."

a foreign government against the United States in the event of hostilities." While the court below refused to narrowly limit the term, respondents have apparently attempted to make their own interpretation, or, rather, interpretations,<sup>17</sup> namely, that the word "hostilities" means "war" or "war-time." The difficulty with respondents' so doing is that the court below did not thus narrowly limit the term to mean war; instead its meaning was left at large to just what it said: hostilities. Nor can it be argued that when the California legislature used the term "hostilities," it meant "war." When the California legislature means "war," it says so.<sup>18</sup> And when the California legislature means to specially define a term, including a term such as "war," it does so.<sup>19</sup>

Not only did the California legislature use the term "hostilities" and not "war," but it did not define the term, leaving it, as did the court below to its usual meandering. Webster's New International Dictionary (2d Ed., unabridged) defines "hostility" as

"state of being hostile, public or private enmity, unfriendliness; animosity."

Thus it is a word meaning something far less than war. During its history the United States has been involved

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<sup>17</sup>"war-time support of a foreign government" (Br. 5); "war-time aid to the enemy" (Br. 7); "war-time support of an enemy" (Br. 8); "war support to her enemy" (Br. 13, 44); "war-time support of its enemies" (Br. 17, 42, 44, 51, 53, 59); "enemy support" (Br. 20) "Treason" (Br. 40); "war-time support of a foreign government against the United States" (Br. 40).

<sup>18</sup>E.g. Government Code §§45080, 19392, 26204, 29148, 32039, 68099, 18544, 6007, 74510, 1025, 19200, 19573, 18973; Ins. Code §§10248, 11730x; Military and Veterans Code §§146, 147, 1500; Penal Code §682; Code of Civil Procedure §354; Labor Code §§1850, 1812; Education Code §§14449, 14610; Public Utilities Code §§2727, 2728; Business and Professions Code §114.

<sup>19</sup>E.g. Business and Professions Code §114.5; Education Code §29; Fish & Game Code §429; Government Code §§45083, 53070; Military & Veterans Code §§18, 1635.

in but few wars, but it has been almost constantly involved in "hostilities." In Volume II of the publication "U. S. Marine Operations in Korea, 1950-1953" (The Inchon-Seoul Operation) (Historical Branch, G-3, Hq. U. S. Marine Corps, Washington, D. C., 1955) at page 11, we are told that:

"During the half century since the Spanish-American War, there had been only two years when U. S. Marines were not on combat duty somewhere. It had long been a tradition, that the Marines, as transitory naval forces, might land on foreign soil without the implications of hostilities usually associated with invasion. This principle was involved, along with a liberal interpretation of the Monroe Doctrine, by the State Department from 1906 to 1932 in the Caribbean and Central America. As a means of supervising unstable governments in sensitive strategic areas, Marines were sent to Cuba, Mexico, Haiti, the Dominican Republic, Nicaragua, and China for long periods of occupation."

But even criticism of even such endeavors are prohibited by the Oath.

Condemnation of some of our military enterprises in the past is not unknown. And advocacy of support of the object of our military power against the United States by responsible "non-treasonable" bodies and persons is likewise not unknown. For example, in 1847 the legislature of Massachusetts adopted a resolution (set out in the margin)<sup>20</sup> which can only be regarded as being in

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<sup>20</sup>From Old South Leaflets (Boston, 1883), Vol. VI, No. 132, pp. 138-167:

"Resolved, That the present war with Mexico has its primary origin in the unconstitutional annexation to the United States of the foreign State of Texas, while the same was still at war with Mexico; that it was unconstitutionally commenced by the order of the President, to General Taylor, to take military possession of territory in dispute between the United States and Mexico, *and in the occupation of Mexico*; and

support of Mexico and against the United States. And there was much said against our participation in the Philippines.<sup>21</sup>

Does the Oath of Section 32 prohibit such advocacies? What if, as happened in Massachusetts in 1847, California's policy was *contra* to that of Federal policy? What does the Oath now mean? Who is the Church to follow? It must be remembered that this portion of the Oath has nothing to do with the state. No guidance is given the conscientious oath taker as to whether the

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that it is now waged ingloriously,—by a powerful nation against a weak neighbor,—unnecessarily and without just cause, at immense cost of treasure and life, for the dismemberment of Mexico, and for the conquest of a portion of her territory, from which slavery has already been excluded, with the triple object of extending slavery, of strengthening the 'Slave Power,' and of obtaining the control of the Free States, under the Constitution of the United States.

*"Resolved, That such a war of conquest, so hateful in its objects, so wanton, unjust, and unconstitutional in its origin and character, must be regarded as a war against freedom, against humanity, against justice, against the Union, against the Constitution, and against the Free States; and that a regard for the true interests and the highest honor of the country, not less than the impulses of Christian duty, should arouse all good citizens to join in efforts to arrest this gigantic crime, by withholding supplies, or other voluntary contributions, for its further prosecution, by calling for the withdrawal of our army within the established limits of the United States, and in every just way aiding the country to retreat from the disgraceful position of aggression which it now occupies toward a weak, distracted neighbor and sister republic."* (Italics in original.)

<sup>21</sup>E.g. the platforms of the American Anti-Imperialist League, Chicago, Oct. 18, 1899 contained the following (Speeches, Correspondence and Political Papers of Carl Schurz, edited by Frédéric Bancroft; N. Y. 1913; Vol. VI, pp. 77-79):

"We earnestly condemn the policy of the present National Administration in the Philippines. . . . We deplore the sacrifice of our soldiers and sailors, whose bravery deserves admiration even in an unjust war. We denounce the slaughter of the Filipinos as a needless horror. We protest against the extension of American sovereignty by Spanish methods.

"We demand the immediate cessation of the war against liberty, begun by Spain and continued by us. . . ."

Nicaraguan or Haitian operations by our marines are included. And if the oath does encompass such matters has not the State gone too far?<sup>21a</sup>

In a concurring opinion in *American Communications Association v. Douds*, 339 U. S. 382, 420 it was said:

" . . . It should not be assumed that oaths will be lightly taken; fastidiously scrupulous regard for them should be encouraged. . . . If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congressional exaction. . . .

The cardinal article of faith of our civilization is the inviolate character of the individual. A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person. Entry into that citadel can be justified, if at all, only if strictly confined so that the belief that a man is asked to reveal is so defined as to leave no fair room for doubt that he is not asked to disclose what he has a right to withhold."

The oath at bar does just that. To paraphrase the same thought expressed in the concurring opinion in *Garner v. Board of Public Works*, 341 U. S. 716, 727, 728:

" . . . Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent (utterances)

"Giving full scope to the selective processes open to our municipalities and states in securing (churches) free from allegiance to any alien political authority, . . . it is (not) consonant with the Due Process Clause for (churches) to be asked, on pain of giving up (the traditional church tax exemption), to swear to something they cannot be expected to know . . ."

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<sup>21a</sup>Cf. *Butler v. Michigan*, 352 U. S. 380.

Accordingly it is clear that even aside from the question as to whether the majority below correctly applied the law as to when advocacy can be prohibited and when it cannot, the Oath here must fall because of its vagueness concerning what is prohibited and its broadness in prohibiting utterances even at times of small, if any, peril.

Respondents are incorrect in their assertion (Br. 27) that the court below correctly drew the line between the type of advocacy that could and could not be prohibited. The court below drew no such line at all. The line it drew was between action and belief (R. F. 47), and then it equated advocacy with action and thus prohibitible. But its citation (R. F. 47) of *Gitlow v. New York*, 268 U. S. 652 for the proposition that advocacy equals action is not apposite. That case did not so hold.

The true meaning of the majority below as to where the line may be drawn is seen from its analogizing the present case with *Dennis v. United States*, 341 U. S. 494, and its understanding (R. F. 53) of the instruction in that case "that if the defendants actively advocate governmental overthrow by force and violence as speedily as circumstances would permit, then as a matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." After thus quoting only part of the instruction from *Dennis* and leaving out the very part as to "incitement to action" which this Court found fatal in *Yates v. United States*, 354 U. S. 298, the court below then went on to say (R. F. 53): "In the present case the constitutional provision is concerned with those who advocate the same prohibited activity." But if the advocacy being considered is advocacy absent incitement to action then, as *Yates* makes clear, such advocacy cannot be pro-

hibited. As previously pointed out (Pet. Op. Br. 14-15) the dissent below made no such error.

But even if the court below did constitutionally apply the word "advocacy" to the force and violence part of the Oath, it made no effort to even discuss its application to the support of a foreign government in the event of hostilities part of the Oath. And the attempt to apply it to that portion of the Oath leads to naught save to demonstrate the impossible and inherent vagueness of the Oath. How can one now advocate (in the sense of now inciting to action) support of a foreign government against the United States *in the event* of hostilities, whatever and whenever and against whomever those may be. While perhaps, technically, one can engage in the mental gymnastics necessary to achieve so remarkable a condition of mind, "constitutional rights should not be frittered away by arguments so technical and unsubstantial." (Brandeis, J. dissenting in *U. S. ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*, 255 U. S. 407, 431.)

The Oath requires petitioners to swear as to an uncertainty. It is therefore too vague to stand.

### Conclusion.

The decisions below should be reversed.

Respectfully submitted,

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## APPENDIX.

### Excerpts From Statements by Churches Concerning the California Loyalty Oath for Churches.<sup>1</sup>

#### American Baptist Convention.<sup>2</sup>

"If the state can exact a loyalty oath as the price for tax exemption today, tomorrow it can redefine the meaning of loyalty and demand that the church curriculum and the pulpit come under the state-imposed definition.

"To admit to this threat to freedom itself where there is no justified question of loyalty to the state is to invite control when there may be every reason to challenge the claims of the state in the name of God. The question of loyalty is not the issue. No group has been more loyal than Christians. The question is one of segregation of church and state, of the free exercise of religion. To grant that the state can exact an oath of allegiance, define loyalty and impose penalties is to surrender freedom itself. . . ."

#### Methodist Discipline.<sup>3</sup>

"We protest legislation requiring the loyalty oath of any church to any state or nation. The church must be in the world but not of it. She belongs to no class, nation, or race. She belongs to Christ. The Church cannot serve two masters. She can obey but one, Jesus Christ. The Church must be free to bring all persons and institutions

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<sup>1</sup>This compilation is by no means intended to be exhaustive but is set forth here simply by way of example.

<sup>2</sup>Atlantic City, May 24, 1955.

<sup>3</sup>These quotations are taken from pages 3 and 4 of the motions by the First Methodist Church of San Leandro and the First Unitarian Church of Berkeley for leave to file a brief *amicus* to argue orally herein.

under the judgment of the gospel. In so far as the state is righteous, it has nothing to fear from the Church. In loyalty to her Lord the Church will be its grave and sturdy ally. But in so far as a state seeks to dominate, the Church must resist. Freedom is secure and justice is maintained only as the Church lives and works among free men, not as a creature subservient to the state, but as a free, unintimidated voice, speaking for Almighty God in opposition to error and evil, and in support of truth and righteousness."

Paragraph No. 2025 of The Methodist Discipline, 1956.

"We declare our support for those churches which are testing the constitutionality of the California law which requires a non-disloyalty declaration as a prerequisite for tax exemption. We hope that all of our churches will find ways of saying unequivocally that the church belongs to God and not to the state. We are loyal to our state and nation, but if that loyalty ever conflicts with our loyalty to God we must serve God first."

Statement Adopted by the California-Nevada Annual Conference: Page 136 of California-Nevada Annual Conference Journal, 1954.

"We must protect the freedom of the church to make moral judgments without coercion from any political institution."

Statement Adopted by the California-Nevada Annual Conference: Page 131 of California-Nevada Annual Conference Journal, 1955.

**American Unitarian Association.<sup>4</sup>**

**"WHEREAS:** California has amended its Constitution and enacted laws requiring a 'Loyalty Oath' of all churches claiming tax exemption;

**"WHEREAS:** Such Constitutional amendment and laws violate the traditional separation of Church and State and seek to establish State control over present and future actions and utterances by the Church in matters of conscience; and

**"WHEREAS:** This Constitutional amendment and these laws are contrary to the American tradition and are an abuse of the taxing power;

**"THEREFORE BE IT RESOLVED:** That the American Unitarian Association go on record as condemning this Constitutional amendment and these laws as an attack on freedom of religion and as supporting efforts to test its constitutionality in the courts."

**Southern California Council of Protestant Churches.<sup>5</sup>**

**WHEREAS,** this legislation violates the essential nature of the Church for such reasons as:

1. The Church is more than a human institution. She is Divine. She has been provided for mankind by God through the life, and continuing presence of Jesus Christ; existing among men as the Body of Jesus Christ.

2. The Church rises above all divisions of politics, class, nation, or race, to serve all mankind as God's in-

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<sup>4</sup>R.F. 15, 25. It is noted that among the leaders of Unitarianism are Thomas Jefferson, William Ellery Channing, Joseph Priestly, Francis David and Michael Servetus. [R.F. 14, 24.]

<sup>5</sup>Part of a statement signed by some 600 ministers March 11, 1957, and adopted by the Federation on March 26, 1957.

strument for salvation. She exists through a fellowship which transcends all man made boundaries and barriers.

3. The Church belongs to no class, nation, or race. She belongs to Jesus Christ and to Him alone. Hence, her loyalty belongs to Christ alone. The Church cannot serve two masters. She can obey but One, Jesus Christ.

4. The Church has given birth and nourishment to laws and principles in United States Government which recognize the Church's divine origin and separation.

5. The Church must be free to summon all persons and institutions to repentance, including heads of government and government itself. Insofar as the state is righteous it has nothing to fear from the Church of Jesus Christ. It needs no loyalty oath. The Church in loyalty to Jesus Christ will be its strongest and bravest support, even as she has been for the United States of America. But insofar as the state be evil, let it fear and tremble, for the Church in loyalty to Jesus Christ must be its most unrelenting opposition; a stern voice of rebuke and judgment, an unflinching and practitioner of redemptive love.

6. When the state presumes to define under what conditions the Church constitutes a medium of expression for subversion it arrogates to itself the power to regulate the nature of the Church and its forum of communication.

WHEREAS, this legislation violates the essential spirit of Americanism which was born of people, who knowing the tendency of a state toward overweening power, were determined that these United States should be a nation under God, and who believed that no government will long honor the restraints which guarantee freedom and dignity for the individual unless that government bows in allegiance to Higher Law than its own self-interest and a Higher Power than its own, and

WHEREAS, this legislation violates the Constitution of the United States which provides for separation of Church and State, and

WHEREAS, a loyalty oath is futile as a device for discovering the existence of treason since those plotting treason would welcome it as good "cover," punishment for perjury being of slight consequence compared with apprehension for treason, and

WHEREAS, this legislation is part of the current hysteria in which some citizens consider it an act of patriotism to be suspicious of the patriotism of others, and

WHEREAS, this legislation appears to rest upon the assumption that a person or organization is guilty unless he or it specifically declares otherwise, an assumption contrary to the law and traditions of freedom in our land, and

WHEREAS, loyalty oaths through the centuries have been used as a coercion device of tyranny for securing conformity and repressing freedom, and

WHEREAS, freedom is secured and justice maintained only as there stands in the midst an Institution not subservient to or controlled by the State, but a free and unintimidated voice speaking for Almighty God in support of righteousness and in opposition to evil.

**South Bay Area Ministerial Association.\***

" . . . this law is a departure from the long American tradition and constitutional guarantees of the separation of church and state."

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\*The Churchman, April 1, 1954, page 6.

**Northern California-Nevada Council of Churches.<sup>7</sup>**

“ . . . Even though most of our churches have signed this oath and even though we castigate Marxian Communism for the atheistic system which it is, still we protest the loyalty oath requirement. . . . We hold that . . . it is a movement of the State into the hitherto free area of men's minds. . . . ‘Over every state,’ one of our teachers has reminded us, ‘there broods something of the light of the divine creation and a heavy cloud of anti-divine forces.’ We see in this oath the first lowering of the dark cloud and it alarms us!”

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<sup>7</sup>Form letter dated April 18, 1957, circulated for the Council by the Council's Commission on Legislation and Public Morals.